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No. 75-473

IN THE

SUPREME COURT OF THE UNITED STATES

GEORGE L. HAHN
AND
MARY HAHN
Petitioners,

vs.

IMOGENE K. HAHN
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

RANDALL W. PEES
88 East Broad Street
Columbus, Ohio 43215
Phone 614/221-5207
Attorney for Petitioners.
VOLKEMA, PEES & SNEVEL

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No.

GEORGE L. HAHN
and
MARY HAHN

Petitioners,

vs.

IMOGENE K. HAHN

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO

Petitioners George L. Hahn and Mary Hahn pray that a writ of certiorari be issued to the Supreme Court of Ohio to review the judgments rendered on June 27, 1975, in case number 75-331 dismissing the petitioners' appeal as of right without opinion (Appendix A) and overruling the petitioners' motion for an order directing the Court of Appeals of Franklin County to certify its record (Appendix B); and the decisions of the Court of Appeals of Franklin County, Ohio rendered December 31, 1974 on petitioners' appeal (Appendix C) and on February 11, 1975, on petitioners' motion for reconsideration (Appendix D) affirming the decision of the Court of Common Pleas of Franklin County, Ohio (Appendix E) for which no judgment entry has ever been filed.

OPINIONS BELOW

The opinions of the Court of Common Pleas of Franklin County, Ohio and the Court of Appeals of Franklin County, Ohio, are not reported. They are, however, reproduced below in Appendix E and D, respectively. The decision of the Supreme Court of Ohio was rendered without opinion.

JURISDICTION

The judgments of the Supreme Court of Ohio for which review is sought are dated June 27, 1975 (Appendix A, Appendix B). Jurisdiction of this court to review the judgments of the Supreme Court of Ohio by writ of certiorari is conferred upon this court by Title 28 of the United States Code, §1257(3) of which provides:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> '...3. By writ of certiorari... where any title, right, privilege or immunity is specially set up or claimed under the constitution, treaties or statutes of, or commission held or authority exercised under, the United States.'"

QUESTIONS PRESENTED FOR REVIEW:

QUESTION ONE: FULL FAITH VS. SUPREMACY

IF the defendant's future military retirement pay is not a property right under controlling federal law which prohibits all courts from attaching such pay by judgment,

THEN (a) does defendant forever waive his right to rely upon the supremacy of federal law by failing to appeal from a Texas Court's judgment *in rem* which orders the pay seized as "property" and distributed to the plaintiff,

OR (b) may defendant collaterally attack the Texas judgment as void and unconstitutional in a later action brought by plaintiff to enforce it in Ohio under the Full Faith and Credit Clause,

AND (c) may defendant also directly challenge the constitutional power of the Ohio court to seize the federally protected funds?

QUESTION TWO: PROCEDURAL DUE PROCESS

IF a *state constitution* grants an appeal to the highest state court as a matter of *right* in cases involving questions arising under the Constitution of the United States, and where the *Rules of Appellate Procedure* of a state *require* the intermediate courts of appeal to pass in writing upon all errors assigned and briefed,

THEN has a defendant been deprived of property without due process of law in violation of the 14th Amendment of the Constitution of the United States,

IF (a) the intermediate court refuses to pass in writing upon his timely claim that a trial court's judgment depriving him of specific "property" is in violation of federal law and the supremacy clause of the United States Constitution and,

IF (b) the highest state court *sua sponte* dismisses his *appeal as of right* therefrom.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED:

CONSTITUTION OF THE UNITED STATES OF AMERICA, Article 6, Clause 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges of every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

CONSTITUTION OF THE UNITED STATES OF AMERICA, Amendment XIV, Section 1

...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; ...

31 UNITED STATES CODE, Section 203

Assignments of claims; ...
All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, ...except as hereinafter provided, shall be absolutely null and void, ...

OHIO CONSTITUTION, Article IV, Section 2

(2) The supreme court shall have appellate jurisdiction as follows: ...

(a) in appeals from the courts of appeals as a matter of right in the following: ...

(iii) cases involving questions arising under the Constitution of the United States...

OHIO RULES OF APPELLATE PROCEDURE, Rule 12

(A) *Determination*. ...All errors assigned and briefed shall be passed upon by the court in writing, stating the reasons for the court's decision as to each such error. Amended eff. July 1, 1973.

STATEMENT OF THE CASE

Petitioner George Hahn and respondent Imogene Hahn were husband and wife for a period of more than 22 years ending in October, 1967, with a decree of divorce by a domestic relations court in the state of Texas, which decree divided the property of the parties. That decree is not directly related to this case.

On November 18, 1967, petitioners George and Mary Hahn were married in Texas. In November of 1969, the petitioners moved to and established residence in Ohio and have remained citizens of Ohio thereafter.

At all times pertinent hereto, petitioner George Hahn has been a member of the United States Air Force who remained on active duty until January 1, 1970, when he was retired with the rank of Colonel, subject to recall by the President of the United States.

Since retirement petitioner George Hahn has received from the United States of America periodic retirement payments and petitioners believe that the United States will continue to make similar payments in the future during his lifetime.

On June 2, 1972, respondent Imogene K. Hahn, then a resident and citizen of the state of Texas, obtained a judgment against both petitioners from the Common Pleas Court of Tarrant County, Texas, in an action at common law to partition property, which judgment declared that, according to Texas law, prior to and at the time of their divorce, respondent Imogene K. Hahn and petitioner George Hahn had jointly held a vested property right in

the retirement pay which petitioner George Hahn might receive in the future from the United States of America under federal statutes, in accordance with the common law of Texas.

Said Texas judgment granted the respondent's prayer to "partition" the said "vested property rights" of petitioner George Hahn and the respondent and further ordered an "execution" against a proportionate share of this future "property" supposedly possessed by or vested in the retired officer and his wife. (Appendix G)

On March 8, 1973, the respondent initiated an action before the Court of Common Pleas of Franklin County, Ohio against the petitioners herein to execute the said Texas judgment and to seize the funds. As indicated in Appendix F, petitioners argued that federal law which governed the retirement pay precludes such action and must be given supremacy.

The Court of Common Pleas of Franklin County, Ohio, sustained the motion by respondent for summary judgment. No Judgment Entry has been filed yet. On December 31, 1974, the Court of Appeals for Franklin County affirmed the summary judgment without discussing the supremacy clause arguments which had again been raised by petitioners (Appendices C and F). On February 11, 1975, the Franklin County Court of Appeals denied petitioners' motion for reconsideration without considering the supremacy clause arguments which had been raised for the third time by petitioners (Appendix F). On June 27, 1975, the Supreme Court of Ohio by means of a printed form *sua sponte* dismissed the petitioners'

appeal as of right on the basis that their supremacy clause argument (now raised for the fourth time) presented no constitutional issue (Appendix A) and on the same day that Court overruled petitioners' motion for an order directing the Court of Appeals of Franklin County to certify its record (Appendix B). There is no other higher appellate procedure available to petitioners within the state of Ohio.

Thus, the Texas judgment presently being executed in the Ohio courts orders Mary Hahn to pay to her husband's former wife a proportionate share of the funds *he* receives as retirement pay, whether or not *she* ever had access to the money herself. This, petitioners claim, is paradoxical because, for example, if the retired officer should decide to abandon his present wife and to escape the jurisdiction of the Ohio courts, his wife will be required to pay a woman in Texas "property" which she does not have and which she can never acquire under Ohio or Federal law.

FEDERAL AND CONSTITUTIONAL ISSUES TIMELY RAISED

At each level in the state courts of Ohio petitioners timely raised the issue of the Supremacy Clause of the United States Constitution which they claim preempts the states from exercising jurisdiction over military retirement benefits. The assertions by petitioners of this issue are suggested above but are voluminous and therefore are presented in more detail in Appendix F.

ARGUMENT

Question One which is raised above ("in terms and circumstances of the case" as required by *Supreme Court Rule 23(C)*) may be stated more simply and generally as follows:

> Where a state court judgment *in rem* apportioning "property" appears to be void on its face because it violates the supreme federal law regulating the "property," must the judgment nevertheless be given full faith and credit in another state, where the "property" is allegedly located, solely because the defendant did not appeal in the foreign state where judgment was rendered?

The underlying issue in this case may be stated even more succinctly:

> Where a state court must choose between the duty to give full faith and credit to the judgments of a sister state and its duty to give supremacy to federal law notwithstanding the law of another state, which clause of the Constitution must it follow?

The three Ohio courts to which this issue was presented rendered the following decisions, each of which contradicted the decisions of each of the other two Ohio courts (even though the practical effect was the same):

> 1) The trial court *decided* the supremacy clause question against petitioners on the merits.

2) The Appellate Court (in violation of its own rules) *refused to decide* the supremacy issue, holding, by implication, that a foreign judgment may not be collaterally attacked even where the supremacy clause makes it void on its face and further that the power of the Ohio courts to give Full Faith and Credit to such a void judgment may not be reviewed on appeal.

3) The Ohio Supreme Court (in violation of the state constitution) refused to review the two lower courts' rulings on the conflict between the Supremacy Clause and the Full Faith and Credit Clause, holding that petitioners had *not even raised* a constitutional question.

Petitioners contend that each of the Ohio courts refused to comply with its constitutional duty to give Supremacy to federal law, and further that the two higher state courts deprived petitioners of property without due process by refusing to consider the constitutional claims raised.

THE TRIAL COURT DECISION DENIES SUPREMACY TO FEDERAL LAW

The trial court simply held that the state law of Texas allowing a seizure of petitioner's future military retirement pay did not violate federal law.

When the Texas law upon which respondent's judgment is based was established by that state's Supreme Court, the supremacy arguments raised herein were not dis-

cussed and apparently no effort was made to petition this court for a writ of certiorari. *Busby vs. Busby* (Tex.Sup.Ct. 1970) 457 SW 2d 551. Petitioners submit that the issue should now be considered.

Despite the community property law of Texas, the Federal Anti-Assignment Statute (31 USCA, §203) precludes attachment by state courts of military retirement pay governed by federal law. This statute is directly comparable to an Anti-Assignment statute, considered in the case of *Wissner vs. Wissner*, 338 US 565 (1950) under which a federal law regulating a congressionally established insurance plan was held to be supreme over the community property law of California which would have given the military officer's widow a community property right in the policy proceeds because (unlike this case) community assets were used to obtain the benefits later received.

The federal courts have long regarded military retirement pay as a mere gratuity creating no property right.

> "The leader in this decisional line is *Lynch vs. United States*, 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434 (1934), where the Court distinguished between pension-type benefits and rights under War Risk Insurance:
>
> > War Risk Insurance, while resembling in benevolent purpose pensions, compensation allowances, hospital and other privileges accorded to former members of the Army and Navy or their dependents, differs from them fundamentally in legal incidents. Pensions, compensation allowances, and pri-

> vileges are gratuities. They involve no agreement of parties; and the grant of them creates no vested right. The benefits conferred by gratuities may be redistributed or withdrawn at any time in the discretion of Congress. ...On the other hand, war risk policies, being contracts are property and create vested rights. The terms of these contracts are to be found in part in the policy, in part in the statutes under which they are issued and the regulations promulgated thereunder." *de Rodulfa vs. U.S.*, 461 F. 2d 1240 (1969-72)

Federal law governing property interests in federally regulated funds (particularly military retirement pay) has consistently been given supremacy by this and other federal courts over the holdings of state courts (including Texas courts) to the effect that only a question of local law as to "purely private ownership" is involved in the state courts' community property decisions. *Free vs. Bland*, 396 U.S. 663, 8 L.Ed. 2d 180, 82 S.Ct. 10 89 (1962); *U.S. vs. Smith*, 393 Fed. 2d 318 (USCA 5th 1968 [Fed. Dist. Ct. of Appeals for Texas])

THE APPELLATE DECISION REFUSED TO CONSIDER THE CONSTITUTIONAL ATTACK

By its refusal to discuss the federal supremacy issue discussed above, the Ohio Appellate Court apparently assumed, arguendo, that the Texas judgment violates the Supremacy Clause and is therefore void on its face. This view is fortified by the

respondent's failure to brief the issue of federal supremacy in the Appellate Court. Reduced to its essence, however, the Appellate Court decision holds that because petitioners did not appeal in Texas, they must be precluded not only from collaterally attacking the Texas judgment but also from directly attacking the power of Ohio's courts to seize the federal funds.

Thus, since the Ohio Supreme Court refused to act, the substantive law of this case to date is that every final order of a state court is *res adjudicata* as to *every* issue which could have been litigated and must always be given full faith and credit in sister states *without exception*, even where it appears on the face of the judgment that it violates federal law and that enforcement of it by the *forum court would therefore also violate federal law*.

Although petitioners admit that the trend in the latest decisions of this court is to guarantee the enforceability of foreign judgments even where a want of jurisdiction is claimed (see for example *Durfee vs. Duke*, 375 U.S. 106 [1963]) plaintiffs can find only one recent decision of this court where the jurisdictional defect arose because of the supremacy of federal law. This court has expressly distinguished the ordinary situation of subject matter jurisdiction from a case in which the claim is that the jurisdictional issue is preempted by federal law. In *Kalb vs. Feuerstein*, 308 U.S. 433, this court held that a judgment of a state court which violates the supreme law of the land is "void and subject to collateral attack" (Syllabus 3) and the court went on to hold that "whether the jurisdiction of the state

court to proceed thus was contested...or could have been contested is immaterial." In justification thereof, this court explained:

> "The states cannot...vest state courts with the power to violate the supreme law of the land." 308 U.S. 433 at 439

Petitioners submit that state courts must provide litigatns claiming a denial of their rights under the United States Constitution a reasonable opportunity to be heard both at the trial and appellate levels on such question. Failure to do so is a violation of due process of law in the Fourteenth Amendment. *Reece vs. Georgia* (1955) 350 U.S. 85, 100 L.Ed. 77, 76 S.Ct. 167, reh den 350 U.S. 943, 100 L.Ed. 822, 76 S.Ct. 297. By way of illustration, that amendment's due process clause requires the states to provide some postconviction procedure to correct unconstitutional denials of federal constitutional rights at trial. "It is not simply a question of state procedure," this court has held, "when a state court of last resort closes the door to *any* consideration of a claim of denial of a federal right." *Young vs. Ragen*, (1949) 337 U.S. 235, 93 L. Ed. 1333, 69 S.Ct. 1073.

The court is not asked in this case to decide how, when or where the federal constitutional issue must be raised, the question rather is whether a state court of last resort may be excused from its duty to review a federal constitutional issue in accordance with the requirements of the state court constitution simply because the defendant, then a resident of the forum state did not appeal in the foreign court.

Petitioners submit that since their issue is one involving the supremacy of federal law under the United States Constitution and since the funds administered are those in the control of the United States Government, they are entitled to a judicial determination both by the trial court and the Supreme Court of Ohio which under the state constitution is required to determine federal constitutional issues. Certainly Ohio under the decisions of this court could have avoided an appellate procedure under which it would be obligated to decide these constitutional issues. It, however, in establishing its own judicial procedure chose to afford the right of review over federal constitutional questions. Having done so, it established a procedure which must be complied with in order to satisfy the Fourteenth Amendment of the United States Constitution.

THE HIGHEST TWO STATE COURTS DENIED DUE PROCESS

Petitioners contend that Question Two raised above is self-explanatory, clearly applicable to this case, and should be answered affirmatively.

When the state courts violate their own procedures which are designed to guarantee compliance with the United States Constitution, as well as federal and state law, they not only deprive United States citizens of due process but also inflict costly and unnecessary extra burdens upon the federal court system and especially upon this court.

At the very least the Ohio Supreme Court should be required to decide petitioners' constitutional claims.

Respectfully submitted,

VOLKEMA, PEES & SNEVEL

By: Randall W Pees
RANDALL W. PEES
Attorneys for Petitioners

APPENDIX A

THE SUPREME COURT OF OHIO

THE STATE OF OHIO, 1975 TERM
City of Columbus, To wit: June 27, 1975

Imogene K. Hahn,
Appellee,
-vs-
George L. Hahn, et al.
Appellants.

No. 75-331
APPEAL FROM THE COURT OF APPEALS FOR FRANKLIN, COUNTY

This cause, here on appeal as of right from the Court of Appeals for Franklin County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Franklin County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this 27 day of June, 1975
/s/ Thomas L. Startzman, Clerk
_____ Deputy

APPENDIX B

THE SUPREME COURT OF OHIO

THE STATE OF OHIO, 1975 TERM
City of Columbus, To wit: June 27, 1975

Imogene K. Hahn,
Appellee,
-vs-
George L. Hahn, et al.
Appellants.

No. 75-331
MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR FRANKLIN COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Randall W. Pees.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copies from the Journal of this Court.

Witness my hand and the seal of the Court this 27 day of June, 1975
/s/ Thomas L. Startzman, Clerk
_____ Deputy

APPENDIX C

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

Imogene K. Hahn,
8319 South Western Blvd.,
Dallas, Texas 75206,
Plaintiff-Appellee,
v. No. 74AP-333
George L. Hahn,
and
Mary Hahn,
Defendants-Appellants.

D E C I S I O N
Rendered on December 31, 1974

TYACK, SCOTT & COLLEY,
MR. THOMAS M. TYACK and
MR. MICHAEL F. COLLEY,
536 South High Street,
Columbus, Ohio,
For Plaintiff-Appellee.

VOLKEMA, PEES & SNEVEL,
MR. RANDALL W. PEES,
88 East Broad Street,
Columbus, Ohio,
For Defendants-Appellants.

STRAUSBAUGH, J.

This is an appeal by defendants from a judgment of the Common Pleas Court sustaining plaintiff's motion for summary judgment.

The facts are essentially agreed to by the parties. Plaintiff, Imogene Hahn, and defendant Colonel George Hahn were married in 1944 and divorced in 1967 by order of the Domestic Relations Court No. 2 of Tarrant County, Texas. Texas is a community property state. The order of the divorce court granting the divorce incorporated a property settlement agreement of the parties which did not refer to defendant Hahn's future military pension benefits. Subsequently, plaintiff brought proceedings in Tarrant County, Texas against both defendant George Hahn and his new wife Mary Hahn claiming that defendant Hahn, prior to the divorce, had acquired a vested property interest in future retirement benefits which should have been divided by the Texas Domestic Relations Court in the original divorce proceedings.

Defendants moved to Ohio where defendant George Hahn, in 1970, received his first payment of retirement benefits from the United States Government. On June 2, 1972, the 153rd Judicial District Court of Tarrant County, Texas entered judgment in favor of plaintiff allocating the retirement benefits as community property and ordering defendants to turn over a proportionate share of these assets to the plaintiff. No appeal was taken by defendants from this judgment.

On March 8, 1973, this action was commenced in the Common Pleas Court for execution of the Texas judgment, the plaintiff alleging that the Texas Court

had jurisdiction of the subject matter retirement benefits. Both plaintiff and defendants filed motions for summary judgment. The Common Pleas Court sustained plaintiff's motion for summary judgment, from which order this appeal is taken.

Defendants bring five assignments of error, as follows:

1. "The trial court erred in considering matters not properly before it pursuant to Civil Rule 56 in rendering summary judgment for the plaintiff."

2. "The trial court erred in sustaining the motion for summary judgment by the plaintiff."

3. "The trial court erred in overruling the motion for summary judgment by the defendants."

4. "The trial court erred in failing to acknowledge the supremacy of federal law over the law of Texas as to whether or not military retirement benefits are vested property rights in military personnel prior to receipt thereof."

5. "The trial court erred in finding that the state of Texas had jurisdiction of the subject matter of its judgment, to-wit: payments to be made in the future by the United States Government pursuant to a statutory retirement scheme for military personnel."

The crux of this case is Article IV, Section 1 of the Constitution of the United

States, which states:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

The United States Congress, pursuant to authorization above, enacted 29 U.S.C., Section 1738 (1964), which provides:

> "The records and judicial proceedings of any court of any * * * State, Territory, or Possession (of the United States) * * * or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possession as they have by law of usage in the courts of such State, Territory, or Possession from which they are taken."

Defendants should have appealed a judgment rendered by the Texas Court of Domestic Relations. By failing to do so, they cannot effect an appeal in the courts of Ohio by attacking such judgment when enforcement is sought in this state. The courts of this state do not have the power under the Federal Constitution to review the fairness of foreign judgments. The Texas court, having jurisdiction of the parties, is entitled to have full faith and credit given its judgment by the courts of all other states. For the foregoing reasons, defendants' assignments of error are overruled, and the judgment is affirmed. *Judgment affirmed.*

TROOP, P.J., and HOLMES, J., concur.

APPENDIX D

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

Imogene K. Hahn,
8319 South Western Blvd.,
Dallas, Texas 75206,
Plaintiff-Appellee,
v. No. 74AP-333
George L. Hahn,
and
Mary Hahn,
Defendants-Appellants.

D E C I S I O N
Rendered on February 11, 1975

TYACK, SCOTT & COLLEY,
MR. THOMAS M. TYACK and,
MR. MICHAEL F. COLLEY,
536 South High Street,
Columbus, Ohio,
For Plaintiff-Appellee.

VOLKEMA, PEES & SNEVEL,
MR. RANDALL W. PEES,
88 East Broad Street,
Columbus, Ohio,
For Defendants-Appellants.

PER CURIAM.

This matter is before us upon defendants' motion for reconsideration of our decision rendered December 31, 1974.

Defendants argue that their original appeal was prematurely brought, and that the appeal should be dismissed and the cause remanded for the determination by the trial court of a dollar amount of judgment. Defendants' original appeal was from a judgment of the Common Pleas Court, granting summary judgment in favor of plaintiff based upon the Full Faith and Credit Clause, Article IV, Section I of the Constitution of the United States. We affirmed that judgment, which was a final order of the trial court. We find that the appeal was not prematurely brought.

Defendants next argue that this court did not comply with App. R. 12(A), requiring:

> "* * * All errors assigned and briefed shall be passed upon by the court in writing, stating the reasons for the court's decision.* * *"

The court clearly overruled all five of defendants' assignments of error. The reason for overruling each assignment of error is the same for all, that full faith and credit shall be given in each state to the judicial proceedings of every other state. Defendants' motion for reconsideration is overruled, and the judgment is affirmed.

Motion to reconsider overruled; judgment affirmed.

TROOP, P.J., STRAUSBAUGH and HOLMES, JJ., concur.

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

Imogene K. Hahn
8319 South Western Blvd.
Dallas, Texas 75206
Plaintiff-Appellee,

v. No. 74AP-333

George L. Hahn
and
Mary Hahn
Defendants-Appellants.

JUDGMENT ENTRY

This cause came on for hearing upon defendants' appeal and defendants' subsequent motion for reconsideration for determination of questions of law on December 31, 1974 and February 11, 1975 respectively.

Pursuant to legal argument, the motion to reconsider is overruled, and judgment is affirmed in favor of the plaintiff and against defendants as set forth in the written decision of this Court on December 31, 1974. Costs to defendants.

/s/ Dean Strausbaugh
/s/ Horace W. Troop
/s/ Robert E. Holmes

APPROVED:

/s/ Thomas M. Tyack
THOMAS M. TYACK, for Plaintiff-Appellee

/s/ RANDALL W. PEES
RANDALL W. PEES, for Defendants-Appellants

APPENDIX E

COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

IMOGENE K. HAHN,
Plaintiff,
-vs- Case No. 73CV-03-822
GEORGE L. HAHN, Et al.,
Defendants.

DECISION AND ENTRY

Rendered this 28th day of June, 1974.

PETREE, J.

This matter is before the Court on Plaintiff's Motion for Summary Judgment, filed on November 12, 1973, whereby Plaintiff asserts that a Final Judgment obtained in the 153rd District Court of Tarrant County, Texas, is, as a matter of law, entitled to full faith and credit in this Court.

It was held in the Final Judgment of the Texas Court, ". . . that the retirement payments made by the United States of America to the Defendant, Col. George L. Hahn, in the past and if, as and when same shall be made to the Defendant in the future are hereby partitioned and divided . . .". That Court apparently found a vested interest in those retirement payments which had been made and an expectation interest in those retirement payments which would be made in the future and, thereupon, made a division of those interests as community property of the divorced couple.

The defendant now asserts that this judgment should not be accorded full faith

and credit by this Court because it divided that which was not "property" at the time of the divorce. This legal conclusion is drawn from federal court holdings such as Milliken v. Gleason, 332 F. 2d 122, 379 U.S. 1002 quoted as page 1257 of de Rodulfa v. United States, 461 F 2d 1240 as follows:

> "veterans' benefits are gratuities and establish no vested rights in the recipients so that they may be withdrawn by Congress at any time and under such conditions as Congress may impose."

This presents the question as to whether the Texas holding is contrary to federal law and, therefor, such that this Court is precluded from giving full faith and credit to it because of the supremacy of federal laws. See Discussion at 16 Am. Jur. 2d, Conflict of Laws, Section 8, page 18. It is clear from the orders of the Texas Court, quoted above, that its intention was not to establish vested rights in as-yet-unpaid pension benefits but to establish rights in an expectancy, contingent upon actual payment by the United States Government. In view of the lack of conflict between the federal holdings and the Texas order which is collateral to them, the federal law does not preclude enforcement of the Texas Court's decision.

The Texas Court apparently considered that it was not precluded under the laws of its state, from declaring the as-yet-unpaid military pension benefits to be property acquired during marriage and therefor divisable community property. Defendant, in this regard, urges that no property right existed at the time of the

divorce in Texas in 1967, and that the holding in Texas is contrary to public policy in Ohio. It is noted that the Texas Court's Final Judgment, attached to Plaintiff's Complaint, stated that,

> ". . . if the said defendant had retired from active duty at the time that said divorce was granted, he would have been entitled to and would have received retirement payments from the United States of America of $8,487.99 per year or the sum of $707.33 per month;"

There are no Ohio cases directly on point in this regard as Ohio is not a community property state and, therefor, not called upon to determine whether unpaid pension benefits are community property, considering the established law that the Federal Government is under no absolute contractual obligation to pay them. It is, however, a departure from reality to consider payment of military retirement benefits to be an unexpected windfall or change in circumstances for the husband if it occurs subsequent to divorce and therefor not property acquired during the marriage. The possibility exists, of course, that the Federal Government may declare that it will not pay the retirement benefits of its military personnel. That possibility, however, is quite remote and it is clear that persons who make a career of service in the military have in mind that, in doing so, they are building a property right in retirement benefits. It appears that the Texas Court recognized this property right as an expectancy and held that it was community property acquired during the marriage. This court does not find that holding to be contrary to the public policy of Ohio

and so accords full faith and credit to the Final Judgment which is attached to Plaintiff's complaint.

No genuine issue as to any material fact is presented and it is this Court's ORDER that Plaintiff's Motion for Summary Judgment is SUSTAINED.

/s/ CHARLES R. PETREE,
Judge

APPEARANCES:

Michael F. Colley
Attorney for Plaintiff

Randall W. Pees
Attorney for Defendants

APPENDIX F

FEDERAL AND CONSTITUTIONAL ISSUES TIMELY RAISED

The answer filed by the petitioners in the Ohio trial court by way of their third defense to respondent's action to enforce the Texas Judgment stated:

> "No. 3. Defendants further state... that said 153rd Judicial District Court of Tarrant County, Texas was without jurisdiction to render judgment affecting property rights which vested and accrued in the state of Ohio after the marital relation between the parties had ended in Texas."

The facts of this case being basically undisputed, petitioners and respondent filed opposing motions for summary judgment in the Common Pleas Court. The petitioners' memorandum contained the following statements raising the federal constitutional issue:

PROPOSITION OF LAW:

> As a matter of federal law no military officer has a vested legal right to future pension benefits. Such pensions are the bounty of the government which Congress has the right to withhold, distribute, or recall at its discretion.
>
> "Walton v. Cotton, 60 US (19 How) 355, 15 LEd 657; U.S. v. Teller, 107 US 64, 27 LEd 352, 2 SCR 39; Frisbie v. U. S., 157 US 160, 39 LEd 657, 15 SCR 586; In re Lindquist's Estate, 25 Cal(2d series) 697, 154 Pac(2d) 879, rev'g (Cal App(2d series)), 144 Pac(2d) 438."

PROPOSITION OF LAW:

No state has jurisdiction over federal government pension funds so as to grant vested interest rights in them in contravention of federal law.

PROPOSITION OF LAW:

When a community property state has finally dissolved a marriage and has divided the property of the parties, thereafter it has no jurisdiction over property subsequently acquired in the State of Ohio by the husband and his second wife as citizens of Ohio under a gratuitous pension plan of the federal government.

PROPOSITION OF LAW:

A foreign judgment purporting to dispose of specifically designated property acquired by an Ohio citizen in Ohio will not be given full faith and credit where it appears that the foreign Court had no jurisdiction over the said property.

Petitioners also claimed in their memoranda:

> "Texas, in making this determination, has by necessary inference undertaken to set aside a long line of cases interpreting the federal law... the Federal Courts, including the U.S. Supreme Court, have consistently held that the pensioner has no property rights in the military pension, it being a mere gratuity granted by Congress."

> "Full faith and credit does not preclude the forum state from considering the jurisdiction of the foreign court."

> "...Defendants urge that Texas is utterly without jurisdiction over property acquired under federal law in Ohio during the marriage of George and Mary Hahn..."

In a "supplemental brief of defendants re summary judgment" the petitioners again raised the constitutional issues submitted herein saying:

> "The constitutional guarantee granted to litigants in state courts that judgments of those courts will ordinarily be given full faith and credit in the courts of sister states is subservient to the constitutional guarantee to all citizens that the decisions of the United States Supreme Court are binding upon the states as to federal questions; and, where a foreign state court's judgment appears on its face to depend for its validity upon a determination of federal law which is manifestly contradictory to the decisions of the United States Supreme Court on the issue, then such judgment should not be given full faith and credit."

> "...constitutional deference must be given to Supreme Court decisions interpreting federal statutes when a <u>foreign</u> jurisdiction attempts to overturn the United States Supreme Court and have its own rulings on federal questions enforced in the courts of Ohio."

> "...because the United States Supreme Court in construing the

> federal statutes which grant retirement benefits to military personnel has determined that they give no vested property rights whatsoever, a judgment purporting to divide property rights which cannot exist under the Supreme Court's decision is void and violates the Federal Constitution."

In the Court of Appeals of Franklin County, Ohio, petitioners raise the constitutional questions in the following assignments of error:

ASSIGNMENT OF ERROR NO. 4

> The trial court erred in failing to acknowledge the supremacy of federal law over the law of Texas as to whether or not military retirement benefits are vested property rights in military personnel prior to receipt thereof.

ASSIGNMENT OF ERROR NO. 5

> The trial court erred in finding that the state of Texas had jurisdiction of the subject matter of its judgment, to-wit: payments to be made in the future by the United States Government pursuant to a statutory retirement scheme for military personnel.

In their brief to the Court of Appeals, petitioners cited *Free vs. Bland*, 396 U.S. 663, 8 L.Ed. 2d 180, 82 S.Ct. 1089 (1962).

In a reply to respondent's answer brief, the petitioners discussed *Durfee vs. Duke*, 375 U.S. 106 (1963) quoting, as an exception to the general rule:

"Doctrines of federal preemption... may be controlling." *Durfee*, supra, at page 114, citing *Kalb vs. Feuerstein*, 308 U.S. 433

"The *Kalb* case referred to in *Durfee* was one in which mortgagees foreclosed on land owned by a farmer despite a pending bankruptcy proceeding. The state court affirmed a Sheriff's sale when the farmer did nothing to seek a stay of the state court action either in the state court or in the bankruptcy court. The United States Supreme Court held:

> 'The states cannot...vest state courts with the power to violate the supreme law of the land.' at page 439

Syllabus 3 of the *Kalb* decision is as follows:

> 'The action of the state court in this case in proceeding contrariwise without the consent of the bankruptcy court...was in excess of its authority void and subject to collateral attack. And whether the jurisdiction of the state court to proceed thus was contested in the foreclosure proceeding or could have been contested is immaterial.' (Emphasis added)"

Petitioners further discussed the constitutional issue and challenged the power of the Ohio courts to enforce the Texas judgment in the same brief as follows:

> "Article 6, Clause 2 of the United States Constitution binds *this and every other state court* to abide by the Constitution and the federal laws made in pursuance thereof:
>
> '...any Thing in the constitution or laws of any state to the contrary notwithstanding.' (Emphasis added)
>
> *This court owes its duty first* to the federal Constitution and the federal law governing the rights of the parties in this case, and only if it finds that the foreign judgment does not violate those standards may it affirm a foreign judgment which is challenged on the bases of lack of jurisdiction and of the foreign state's attempts to override the law of the land." (Emphasis added)

On January 10, 1975, petitioners timely filed a motion for reconsideration which requested the Court of Appeals:

> "To reconsider the decision rendered herein December 31, 1974, because it fails to comply with Appellate Rule 12(A) which requires the court to consider the reasons for the court's decision and because entry of judgment upon the court's decision would violate Article 6, Clause 2 of the United States Constitution which *requires this court to enforce the Constitution and laws of the United States*, as previously briefed, anything in the Constitution or laws of Texas to the contrary notwithstanding." (Emphasis added)

In support of the motion for reconsideration petitioners cited numerous authorities and reminded the Court of Appeals of the cases previously cited. Reconsideration was denied.

Petitioners timely filed an appeal and a motion to certify the record of the Appellate Court decision to the Supreme Court of Ohio and in their brief stated the following:

PROPOSITION OF LAW NO. 1:

> All errors assigned and briefed in the Court of Appeals shall be passed upon by the Court of Appeals in writing stating the reasons for the Court's decisions. (Citations omitted)

PROPOSITION OF LAW NO. 2:

> In an action to enforce the judgment of a sister state, the Constitutional provision that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state does not prevent an inquiry into the jurisdiction of the court by which a judgment offered in evidence was rendered and does not prevent an inquiry into whether the judgment is void because it is in violation of federal statutory, common, and constitutional law entitled to supremacy under Article 6, Clause 2 of the United States Constitution. (Citations omitted)

PROPOSITION OF LAW NO. 3:

> When the United States Supreme Court has ruled as a matter of federal law that military pensions create no vested property right in the military per-

> sonnel, and when federal statutes preclude attachment of military pensions by way of judgment, and when all monies payable to a retired officer are received in the state of Ohio, a judgment by a state court in Texas purporting to find that the pension benefits had been a vested property right of the retired officer divisible in partition is void for want of jurisdiction and for the reason that it violates the supremacy clause of the United States Constitution and will therefore be given no effect in an action in Ohio to enforce the Texas judgment. (Citations omitted)

Petitioners brief in support of their appeal to the Supreme Court of Ohio contained discussions of the authorities previously cited to the Appellate Court. In raising the constitutional issue petitioners pointed out:

> "The Appellate Court Decision in essence is that a foreign judgment may not be collaterally attacked on the bases that it is void from want of jurisdiction of the subject matter or because it violates the supremacy clause of the United States Constitution. The many authorities cited above are clearly (unquestionably) to the contrary."

APPENDIX G

NO. 51420-C

IMOGENE K. HAHN	§	IN THE 153RD JUDICIAL
VS.	§	DISTRICT COURT OF
COL. GEORGE L. HAHN, ET UX	§	TARRANT COUNTY, TEXAS

FINAL JUDGMENT

BE IT REMEMBERED THAT on the 3rd day of April, 1972, came on to be heard the above entitled and numbered cause, wherein IMOGENE K. HAHN is Plaintiff and COL. GEORGE L. HAHN and wife, MARY HAHN, are Defendants, and the Judge in open court regularly called said cause in its order on the docket at the request of the Plaintiff, and came the parties in person and by and through their respective attorneys of record and announced ready to the Court; and a jury not having been requested by any party, the Court proceeded to hear and consider the pleadings, stipulations of fact, evidence, briefs and argument of counsel, and after hearing and considering same, the Court is of the opinion and finds that the law and the facts are in favor of the Plaintiff and that the Plaintiff ought to recover the following Judgment by reason of the premises against the Defendants, and that the following Judgment should be and is hereby entered in this cause:

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff, IMOGENE K. HAHN, have and recover of and from the Defendants, COL. GEORGE L. HAHN and wife, MARY HAHN, the sum of $7,588.88 with interest thereon at the rate of 6% per annum from date hereof until

paid, for which let execution issue.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Defendant, COL. GEORGE L. HAHN, is hereby ordered and directed to pay to the Plaintiff, IMOGENE K. HAHN, the additional sum of $291.88 per month, if, as and when any additional future retirement payments are made by the United States of America to the said Defendant, COL. GEORGE L. HAHN, for which let execution also issue.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the retirement payments made by the United States of America to the Defendant, COL. GEORGE L. HAHN, in the past and if, as and when same shall be made to the Defendant in the future are hereby partitioned and divided as follows: to the Plaintiff, IMOGENE K. HAHN, there is hereby set aside and awarded an amount equal to the product of 137/332nds of $707.33 per month, or the sum of $291.88 per month out of said retirement payments, and the balance of said retirement payments are hereby set aside and awarded to the Defendants. By way of clarification and in support of the foregoing Judgment of the Court, the Court finds that the Plaintiff and Defendant, COL. GEORGE L. HAHN, were married to each other as husband and wife for 274 months, and that at the time that said marriage was terminated by Judgment of Divorce on October 5, 1967, in the Domestic Relations Court No. 2 of Tarrant County, Texas, hat the Defendant, COL. GEORGE L. HAHN, had served for 332 months in the Military Armed Forces of the United States of America; and that if the said Defendant had retired from active duty at the time that said divorce was granted, he would have been entitled to and would

have received retirement payments from the United States of America of $8,487.99 per year or the sum of $707.33 per month; and that the Plaintiff's community interest in such retirement payments is represented by the fraction 137/332 of $707.33 per month; and that the Domestic Relations Court No. 2 of Tarrant County, Texas, did not partition or divide said retirement payments, nor did the parties to said divorce action dispose of the interest of the community estate in said retirement benefits by property settlement agreement or otherwise, and that same are divided and partitioned in accordance with the foregoing Judgment of this Court; and that the Defendant, COL. GEORGE L. HAHN, had received retirement payments for 26 months as of the date of trial of this cause.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that Plaintiff recover all costs of Court in this behalf expended, for which execution shall also issue, and that all other relief not expressly granted herein is hereby denied.

SIGNED AND ENTERED this 24 day of June, 1972.

/s/ ARDELL M. YOUNG
JUDGE

APPROVED AS TO FORM
FOR ENTRY:

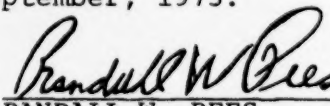
HOPPENSTEIN AND PRAGER

By:/s/ JEROME L. PRAGER
Jerome L. Prager, Attorneys
for Plaintiff

/s/SPENCER SHROPSHIRE,
Spencer Shropshire, Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that 2 copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of Ohio have been hand delivered to Messrs. Thomas M. Tyack and Michael F. Colley, Tyack, Scott & Colley, Attorneys for Respondent at 536 South High Street, Columbus, Ohio 43215, this 24th day of September, 1975.



RANDALL W. PEES
Attorney for Petitioners